ARAB MALAYSIAN FINANCE BHD

v.

HASLIZA HASAN

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[CIVIL APPEAL NO: 11-45 OF 2000]
5 APRIL 2001

HIRE PURCHASE: *Breach of agreement - Failure to pay instalments - Notice of intention to repossess - Failure of defendant to respond to notice of intention to repossess - Whether repossession of hired good is a sine quo non for an action to be filed by the owner to recover moneys due under a hire-purchase agreement - Whether s. 42 of the Hire Purchase Act 1967 applicable - Whether it would be contrary to public policy if a hirer cannot be sued as the owner has not succeeded in repossessing the hired goods*

This was an appeal by the appellant ('plaintiff') against the decision of the learned magistrate who had dismissed the oral application of the plaintiff for judgment in default of appearance against the respondent ('defendant'), and ordered that the plaintiff's action be dismissed. In that case, the plaintiff had sued the defendant to recover moneys due under a hire-purchase agreement of a vehicle, entered into between the plaintiff, as owner, and the defendant, as hirer.

The learned magistrate was following the decision of the High Court case of *Arab Malaysian Finance Berhad v. Suhaimi AW Mohamed* and held that the hire purchase owner must repossess the hired goods first before he can sue to recover moneys due under a hire-purchase agreement. The learned magistrate had ordered the plaintiff's claim be dismissed on the ground that the plaintiff had not taken repossession of the hired goods before filing its claim against the defendant.

Held:

[1] In *Suhaimi*'s case, the judge's observation on the issue whether repossession of a hired good is a *sine quo non* to the commencement of a civil action for money due under a hire-purchase agreement, was merely obiter.

[1b] It was stated in the said case that the owner may take steps to repossess the vehicle in so far as repossession is practically possible. Furthermore, in a situation where repossession is genuinely not possible, the owner can still pursue the claim against the errant hirer.

[1c] The plaintiff had pleaded that it made 39 attempts to repossess the hired vehicle but it could not be found as it had not been in the address agreed to in the hire-purchase agreement and as such, repossession was not possible. Furthermore, from the records of proceedings, the defendant had failed to respond to all the relevant notices issued by the plaintiff and failed to attend court on the return date of the summons as well as the hearing.

[1d] Repossession of the hired vehicle is not a *sine quo non* for the plaintiff (owner) to file his suit against the defendant in the lower court to recover moneys due under the hire-purchase agreement.

[2] The learned magistrate had stated that in the event the owner having served the requisite notices of intention to repossess the hired goods on the hirer, and is unable to repossess them, then the owner has recourse to s. 42 of the Hire Purchase Act 1967. However, s. 42 of the Hire Purchase Act is not applicable to the plaintiff as the plaintiff had no information that the said hired vehicle was still in the possession of the hirer or any other identified person.

[3] It is also the opinion of the court that it would be contrary to public policy if a defendant in such a situation cannot be sued as the plaintiff had not succeeded in repossessing the hired goods. Such a finding could lead to abuse by the hirer and may adversely affect the viability of the hire-purchase industry.

[Appeal allowed.]

Case(s) referred to:
Arab Malaysian Finance Berhad v. Suhaimi AW Mohamed [2001] 1 MLJ 149 ***(dist)***
Butterworth Used Car Sdn Bhd v. Mayban Finance [1991] 3 CLJ 1721 ***(refd)***
Ooi Yoke In & Anor v. Public Finance Berhad [1993] 2 CLJ 464 ***(refd)***

Legislation referred to:
Hire-Purchase Act 1967, ss. 15, 16A, (1), (3), 18(2), 20, 38, 42, 43(c)
Hire-Purchase Regulations 1976, reg. 3

For the appellant - Francis JL Tan; M/s Rosni, Francis Tan & Ho
For the respondent - Absent

Reported by Raja Vishnu

JUDGMENT

Ramly Ali JC:

This is an appeal by the appellant (plaintiff) against the decision of the learned magistrate of Temerloh made on 29 August 2000 whereby the learned magistrate had dismissed the oral application of the plaintiff for judgment-in-default of appearance against the respondent (defendant); and ordered that the plaintiff's action be dismissed. In this case, the plaintiff had sued the defendant to recover moneys due under a hire-purchase agreement dated 9 August 1997 entered into between the plaintiff (as owner) and the defendant (as hirer).

The summons and statement of claim were duly served on the defendant by way of AR Registered letter on 18 July 2000. The defendant did not enter appearance nor file his defence. On the return date of the summons, ie, on 29 August 2000, the defendant failed to appear to answer the summons. The plaintiff's counsel then, orally, asked for a judgment-in-default of appearance be entered against the defendant. The learned magistrate refused to grant the request and proceeded to strike out the plaintiff's claim. It is apparent from the learned magistrate grounds of decision that he had held that a hire-purchase owner must repossess the hired goods first before he can sue to recover moneys due under a hire purchase agreement. The learned magistrate ordered the plaintiff's claim be dismissed on the ground the plaintiff had not taken repossession of the hired goods before filing its claim against the defendant.

The Plaintiff's Statement Of Claim

The plaintiff's claim was based on a hire-purchase agreement governed by the Hire-Purchase Act 1967 (the Act). The statement of claim reads:

1. Plaintiff adalah sebuah syarikat kewangan berlesen yang ditubuhkan di Malaysia dan mempunyai pejabat berdaftarnya di Tingkat 22, Bangunan Arab-Malaysian Finance, No. 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

2. Alamat untuk penyampaian bagi Defendan ialah No. 402, Lorong Semantan 25 Taman Sri Semantan, 28000 Temerloh, Pahang Darulmakmur.

3. Melalui satu perjanjian sewa-beli secara bertulis No. 052-401-0019615-6 bertarikh pada 9hb. Ogos, 1997 (selepas ini dirujuk sebagai "Perjanjian Tersebut") Plaintiff telah menyewa-beli kepada Defendan satu unit kenderaan PROTON SAGA 1.3S dengan nombor pendaftaran JCC 5453 No. Chasis: C21ASNC233751 dan No. Injin: 4G13PAK3257 (selepas dari ini dirujuk sebagai "kenderaan tersebut") dengan jumlah harga sewa-beli sebanyak RM43,790.00 yang kena dibayar secara 72 ansuran bulanan sebanyak 609.00 tiap satu bermula dari 9hb. September 1997 dan ansuran terakhir sebanyak RM551.00 (selepas dan ini dirujuk sebagai "pembayaran secara ansuran tersebut"). Jumlah sewa-beli sebanyak RM43,790.00 yang kena dibayar telah ditolak dari wang pendahuluan sebanyak RM9,700.00 yang telah dibayar oleh Defendan.

4. Di bawah Perjanjian Tersebut, Defendan *inter alia* bersetuju:

4.1. Untuk pembayaran kepada Plaintif:

i) Faedah lewat bayar pada kadar 8% setahun berdasarkan kiraan harian dikenakan ke atas mana-mana ansuran yang tidak dijelaskan mengikut Jadual Pembayaran;

ii) Kos guaman yang berhubung dengan perlaksanaan perjanjian tersebut.

4.2. Bahawa sekiranya Defendan mengingkari pembayaran secara ansuran tersebut maka Plaintif boleh, secara memberi notis bertulis kepada Defendan dengan menghantar atau meletak notis tersebut ke atau di alamat Defendan terakhir yang diketahui oleh Plaintif, untuk menamatkan Perjanjian Tersebut dan penyewaan tersebut dan menuntut terhadap Defendan keseluruhan baki jumlah harga sewa-beli tersebut.

5. Defendan telah gagal untuk membayar ansuran tersebut dan tunggakan ansuran yang masih terhutang berjumlah RM2,763.80 (termasuk faedah dan kos-kos yang telah dikira setakat 15hb. April 2000)

6. Walaupun Plaintif melalui peguam mereka Tetuan Rosni, Francis Tan & Ho, telah memberi notis kepada Defendan bertarikh 17hb. April 2000 supaya menjelaskan pembayaran tunggakan ansuran sebanyak RM2,763.80 tersebut tetapi Defendan telah enggan/gagal untuk menjelaskan.

7. Atas kegagalan Defendan untuk menjelaskan wang tersebut maka melalui notis yang sama juga Plaintiff telah menamatkan penyewaan tersebut dan Perjanjian Tersebut dan menuntut daripada Defendan gantirugi tertentu yang telah dipersetujui sebanyak RM22,676.07 tersebut tetapi Defendan telah enggan/gagal untuk menjelaskannya.

8. Pada masa yang sama dan menurut Seksyen 16 Akta SewaBeli 1967, oleh kerana Defendan telah gagal/enggan untuk menjelaskan pembayaran tersebut maka:

   a) Pada 25hb. Mac 2000 melalui surat berdaftar AR yang dihantar ke alamat Defendan terakhir yang diketahui oleh Plaintif iaitu di No. 402, Lorong Semantan 25 Taman Sri Semantan, 28000 Temerloh, Pahang Darulmakmur, Plaintif telah menyerahkan kepada Defendan satu Notis Niat Untuk Memiliki semula kenderaan tersebut dalam Jadual Keempat Akta Sewa-Beli 1967; dan

   b) Pada 8hb. April 2000 melalui surat berdaftar AR yang dihantar ke alamat Defendan terakhir yang diketahui oleh Plaintif iaitu No. 402, Lorong Semantan 25 Taman Sri Semantan, 28000 Temerloh, Pahang Darulmakmur, Plaintif telah menyerahkan kepada Defendan satu Notis dibawah Peraturan 3, Peraturan-Peraturan sewa-beli 1976 menyatakan bahawa Plaintiff berniat untuk memiliki semula kenderaan tersebut.

9. Selepas itu, Plaintif telah membuat 39 percubaan untuk mengesan dan memiliki semula kenderaan tersebut tetapi gagal kerana kenderaan tersebut tidak dapat dikesan dan tidak disimpan ditempat ia harus di simpan menurut Perjanjian Tersebut.

10. Defendan adalah berhutang kepada Plaintif gantirugi tertentu yang telah dipersetujui berjumlah 22,676.07 dikira sehingga 15hb. April 2000 dan ianya adalah seperti berikut:

Butir-butir di Bawah Aturan 46, Kaedah 3
Kaedah-Kaedah Mahkamah Rendah 1980

Tarikh Perjanjian Sewa-Beli	: 9hb. Ogos 1997	
Pemilik	: Arab Malaysian Finance Berhad	
Penyewa	: HASLIZA BTE HASAN	
Barang yand disewa	: PROTON SAGA 1.3S	
Harga sewa-beli		RM53,490.00
TOLAK		
Bayaran Pendahuluan		RM 9,700.00
Bayaran ansuran dijelaskan		RM17,052.00
Tunggakan ansuran		RM 2,436.00
Rebet berkanun		RM 4,389.73
		RM19,912.27

TAMBAH

Tunggakan ansuran	RM 2,436.00
Lain-lain kos	RM 39.00
	RM22,387.27

Faedah lewat sebanyak 8% ke atas

Tunggakan ansuran dikira setakat

15/4/2000	RM 288.80
JUMLAH:	RM22,676.07

11. Oleh kerana itu Plaintif memohon Penghakiman terhadap Defendan secara bersesama dan berasingan daripada Mahkamah Yang Mulia ini seperti berikut:

a) Jumlah sebanyak RM22,676.07 dikira setakat 15hb. April 2000;

b) Faedah pada kadar 8% setahun (berdasarkan kiraan harian) dan 16hb. April 2000 di atas jumlah RM22,387.27 sehingga penyelesaian keseluruhannya;

c) Kos;

d) Apa-apa pelepasan atau remedi yang difikirkan munasabah oleh Mahkamah Yang Mulia.

From the statement of claim and records of proceedings, it appears that the defendant had failed to respond to all relevant notices issued by the plaintiff as required under the Hire Purchase Act and had also failed to attend court on the return date of the summons as well as the hearing of appeal in this court (even though sufficient notice was given to her by the court registry).

The Learned Magistrate's Ground Of Decision

It is pertinent for me at this stage to refer to the grounds of decision of the learned magistrate in dismissing the plaintiff's claim. His grounds are as follows:

1. Mahkamah berpendirian perjanjian sewabeli secara dasarnya berbeza dengan perjanjian pembiayaan kewangan yang lain. Di dalam perjanjian sewabeli, barang masih lagi di dalam milikan pemberi pinjaman walaupun kawalannya berada pada peminjam (penyewa). Jadi sekiranya berlaku sebarang kemungkinan bagi pihak penyewa, pemberi pinjaman sepatutnya mengambil semula kawalan barang-barang berkenaan.

2. Seksyen 20 Akta Sewa Beli 1967 dan Seksyen 18 Akta yang sama tidak terpakai di dalam kes ini kerana di dalam kedua-dua Seksyen yang tersebut barang-barang mestilah diambil semula milikan.

3. Tiada langsung peruntukan di dalam Akta Sewa Beli 1967 yang membolehkan pihak syarikat kewangan menuntut kesemua wang pembiayaan tanpa menarik balik kenderaan yang terbabit. Syarikat kewangan sepatutnya menarik semula barang-barang dan menjualnya semula dengan harga terbaik. Hanya baki tertunggak selepas ditolak harga jualan terbaik boleh dituntut.

4. Sekiranya Plaintif ada menyerahkan Notis Tentang Niat untuk mengambil semula Hakmilik melalui Jadual Keempat kepada defendan maka Seksyen 42 Akta Sewa Beli 1967 terpakai jika defendan enggan atau gagal mematuhi Notis tersebut. Kegagalan defendan mematuhinya boleh menyebabkan beliau dihukum mengikut s. 46 Akta Sewa Beli 1967.

Atas alasan-alasan di atas, saya tidak membenarkan Penghakiman lngkar Kehadiran dimasukkan terhadap defendan pada 29.8.2000 yang lalu dan membatalkan saman pihak Plaintif. Ini juga selaras dengan keputusan kes Mahkamah Tinggi Temerloh - *Arab Malaysian Finance Berhad v. Suhaimi bin AW Mohamed* Civil Appeal No. 11-89-99 yang diputuskan oleh Y.A Hakim Dato' Mohd. Hishamudin bin Haji Mohd. Yunus pada 14hb. Mac 2000.

Apparently, the learned magistrate was following the decision of the High Court in the case of *Arab Malaysian Finance Berhad v. Suhaimi AW Mohamed* [2001] 1 MLJ 149, which was decided on 14 March 2000. In that case, Mohd. Hishamudin J held that:

In my judgment, in a civil action for recovery of money arising out of a hire-purchase agreement, in the light of the provisions of ss. 16 and 43 (or 43A as the case may be) of the Act and reg. 3 of the Regulations, the Plaintiff, in his Statement of Claim, apart from showing that there has been compliance with O. 46 of the SCR, must also state particulars showing clearly that there has been compliance with such provisions of the Act and Regulations. The requisite particulars are, *inter alia*, regarding the following:

a) whether the Fourth Schedule notice had been served on the hirer, including the date and mode of service;

b) whether the reg. 3 notice had been served on the hirer, including the date and mode of service;

c) whether the vehicle in question had been repossessed, including the date of repossession; and

d) whether the Fifth Schedule notice had been served on the hirer and guarantor, including the date and mode of service.

Basically, I agree with Mohd. Hishamudin J as to all the required particulars that need to be included in the plaintiff's statement of claim for recovery of moneys arising out of a hire - purchase agreement as listed above. However,

my understanding as to particular (c) above is that the plaintiff must state whether the vehicle in question had been repossessed or not. Ultimately, this issue is important to determine the amount to be allowed under the claim. If it had been repossessed, it must be so stated including the date of the repossession. If it had **not** been repossessed for whatever reason, it must also be so stated, of course without the date of repossession. In other words, whether the vehicle was actually repossessed or not, the fact must be so stated in the statement of claim. Particular (c) above does not in any way mean that the vehicle must first be repossessed before filing of the action by the plaintiff. It does not indicate that repossession of the vehicle in question is a *sine quo non* for an action to be filed by the owner to recover moneys due under a hire-purchase agreement.

As to particular (d), my understanding is that it needs to be stated in the statement of claim if, **only if**, the vehicle in question had actually been repossessed. It does not arise in cases where the vehicle had not been repossessed. Particular (d) above talks about 'the fifth schedule notice". It is required to be served on hirer and every guarantor of the hirer under s. 16(3) of the Hire-Purchase Act 1967, 21 days **after the owner has taken repossession** of the goods that were comprised in the hire-purchase agreement. In other words, if the owner has **not** taken repossession of the vehicle for whatever reason, it goes without saying that the statement of claim need not state particular (d). On the other hand, if the owner has repossessed the vehicle in question, then particular (d) must be stated and included in the statement of claim.

Reading the whole judgments in *Suhaimi*'s case, it is clear that the learned judge found that the summons were rightly struck out, as the statement of claim did not contain statement relating to particular (c) - ie, whether the vehicle in question had been repossessed or not, including the date of repossession. To my understanding, the issue of actual repossession of the vehicle, although discussed at length in the decision was not the judge's reason for upholding the striking out of the summons. In the premises, the Judge's observation on repossession is merely *obiter* in that case.

In our present case, all the relevant particulars as laid down in *Suhaimi*'s case have been fulfilled and sufficiently pleaded in the statement of claim. As to particular (a), para. 8(a) of the statement of claim had pleaded that on 25 March, 2000, by AR Registered post sent to the defendant's last known address, the plaintiff had served the notice of intention to repossess the vehicle in the form as per the fourth schedule (the 4th schedule notice). The said service was done in accordance with s. 43 (particularly sub-s. c) of the Hire-Purchase Act 1967 which states:

> Any notice or document required or authorised to be served on or given or sent to an owner or hirer under this Act may be served or sent:
>
> (a) by delivering it to him personally; or
>
> (b) (deleted by Act A813);
>
> (c) by posting it by registered post addressed to him at his last known place of abode or business

As to particular (b), para. 8(b) of the statement of claim had pleaded that the plaintiff had on 8 April 2000 by AR Registered post sent to the defendant's last known address, served on the defendant the notice under reg. 3 of the Hire-Purchase Regulations 1976 (the reg. 3 notice).

As to particular (c), para. 9 of the statement of claim stated that in spite of 39 attempts made by the plaintiff, the vehicle in question could not be repossessed as it could not be tracked down as it was not kept at the address it ought to have been kept under the terms of the hire-purchase agreement. Paragraph 9 clearly indicates that the vehicle could not be repossessed. In other words, the vehicle had not been repossessed for reasons stated therein. This is sufficient for the purpose of pleading for particular (c).

Particular (d), regarding "the 5th schedule notice" only apply after the vehicle had been repossessed under s. 16(3) of the Hire-Purchase Act 1967. It is a notice to be served on the hirer within 21 **days** after the vehicle had been repossessed. As the vehicle had not been repossessed in this case, therefore the 5th schedule notice is non-applicable. There is no necessity for the plaintiff to state particular (d) in his statement of claim as particular (c) as stated under para. 9, had clearly indicated that the vehicle had not been repossessed.

Is repossession Of The Hired - Good Is A *Sine Quo Non* For An Action To Be Filed By The Plaintiff.

From the learned magistrate's grounds of decision, it is apparent that he had held that a hire-purchase owner must repossess the hired goods first before he can sue to recover moneys due under a hire-purchase agreement. That seems to be the only ground for striking out the summons.

In *Suhaimi*'s case the issue on repossession seems to be only *obiter*. The following statements by the judge in that case seems to indicate this finding. At p. 157 (para C - D) it was said:

> a Plaintiff must for the purpose of his civil claim to recover money under a hire-purchase agreement take steps to repossess the vehicle first in so far as repossession is practically possible.

What if for some plausible reason repossession of the vehicle is not possible?. What should an owner do if repossession is genuinely not possible?

To answer those questions, the judge in *Suhaimi*'s case clarified that:

> All that I can say with some measure of confidence is that, in such a situation, it must surely be the law that the owner still can pursue his claim against the errant hirer.

From those statements, my understanding is that an owner can still sue the hirer for money due under the hire - purchase agreement, if repossession is not practically possible. It is totally different and misconceived to say, as the learned magistrate had held in his grounds of decision, that the owner cannot sue the hirer unless he had taken possession of the vehicle first.

Section 16 of the Hire-Purchase Act 1967, deals with repossession of a hired goods. Subsection (1) of s. 16 reads:

> (1) Subject to this section, an owner shall not exercise any power of taking possession of goods comprised in a hire - purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless there had been two successive default of payments or a default in respect of the last payment and he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice.

It is clear that s. 16(1) does not mandate that if there is a default of two successive payments, the owner **must** repossess the goods. Section 16(1) is worded in the negative, ie, the owner may not repossess the goods unless conditions thereunder have been fulfilled. Put in another way, s. 16(1) states that upon two successive default in payment, the owner may repossess the goods (subject to all the other conditions thereunder). It is not mandatory or compulsive for the owner to take possession of the goods in such a situation.

In fact s. 20 of the Hire-Purchase Act 1967, makes it very clear that the owner may sue for money due under the hire-purchase agreement and if upon obtaining a judgment thereon, the court may vary that judgment if the goods was subsequently repossessed and sold. Section 20 states:

> In any legal proceedings in relation to a hire-purchase agreement, after the owner has taken possession of the goods, the court before which the proceedings are brought may vary or discharge any judgment or order of any court against the hirer for the recovery of money so far as necessary to give effect to section 18.

(Section 18 of the same Act deals mainly with the computation of what amounts are chargeable and what are not to the hirer when the hired good is repossessed). Even the learned judge in *Suhaimi*'s case conceded in his grounds of judgment that "s. 20 presupposes an existing judgment or order against the hirer for the recovery of money due under a hire-purchase agreement, which the court pursuant to a legal proceeding under this section may discharge or vary in order to give effect to the rights of the hirer under s. 18". This must then necessary mean further that an owner may initiate an action to sue (and even obtain judgment) before the hired goods have been repossessed.

In *Butterworth Used Car Sdn Bhd v. Mayban Financ*e [1991] 3 CLJ 1721, Abdul Hamid Mohamed JC, held that the right to sue to recover money due under a hire-purchase agreement is concurrent with the right to repossess the hired goods. In dealing with ss. 18(2) and 20 of the Hire-Purchase Act 1967, the learned JC held:

> Kepada saya, peruntukan-peruntukan ini memang menjangka kedua-dua tindakan diambil bersama oleh pemunya (owner). Sebab itu ia mengatakan bahawa pemilik tidak boleh memperolehi lebih daripada amaun yang kena dibayar oleh penyewa mengikut perjanjian, dan sebab itu jugalah Mahkamah mempunyai kuasa untuk meminda penghakiman untuk tujuan itu.

In that case, even though the only issue before the court was in deed on the ownership of the hired goods, the court there had to first determine whether the right to sue for the hire-purchase debt and the right to repossess the goods were concurrent remedies as this will determine the owner still owned the vehicle after it had filed a civil suit against the hirer. The learned JC held that the said rights were concurrent.

The clearest statement on this same issue was enunciated in the case of *Ooi Yoke In (f) & Anor v. Public Finance Berhad* [1993] 2 CLJ 464 where the High Court held that:.

> Furthermore, there is no statutory duty under the Act (Hire-Purchase) for the owner to repossess the BMW car before the owner files an action against the hirer.

In an unreported decision of KC Vohrah J in Kuala Lumpur Civil Appeal No: R1-11-142-98, the appeal before the court was on one issue only, ie, whether an owner must repossess the hired good before he files an action against the hirer. The learned judge ruled in the negative and accordingly dismissed the appeal.

On the above authorities and the relevant provisions of the Hire-Purchase Act 1967, I am of the view that repossession of the hired goods is **not** a *sine quo non* for an action to be filed by the owner to recover money due under a hire-purchase agreement, against the hirer.

Public Policy

I am also of the opinion that it would be contrary to public policy if a defendant in a hire-purchase action could come before a court of law to plead a defence that notwithstanding that he had not paid his hire-purchase instalments and notwithstanding to that he had not returned the hired goods to the plaintiff (owner) although being served with a notice of termination of the hire - purchase agreement and/or a fourth schedule notice (for repossession) under the Act, he could not be sued as the plaintiff had not succeeded in repossessing the hired goods. This finding could lead to abuse by the hirer and may adversely affect the viability of hire-purchase industry. At present, many finance companies are already been frustrated by hirers who illegally sell the hired goods to third parties in contravention of s. 38 of the Act (which makes it an offence to sell hired-goods), and thereby make it impossible for the goods to be repossessed as the identities and whereabouts of the third parties and thus the hired goods become unknown.

Sections 15 and 16A of the Hire-Purchase Act 1967 provides for hirer to surrender the hired goods to the owner and by doing so the Act exempts the hirer from having to pay any costs of and incidental to repossession of the goods. Hirer who no longer could afford to keep the hired goods should be expected to resort to these two provisions. The law cannot be interpreted in such a way that it could be abused by the hirer at the expense of the owner, unless there are express provisions to that effect in the Act itself. The Hire-Purchase Act 1967 is not only meant to protect the interest of hirer, but also the interest of the owner. Proper balance must be drawn between them. Only then the hire-purchase industry can prosper for the sake of all parties concerned.

Section 42 Of The Hire-Purchase Act 1967

The learned magistrate also stated in his grounds of decision that in the event that the owner having served the requisite notices of intention to repossess the hired-goods on the hirer, is unable to repossess them, then the owner has recourse to s. 42 of the Hire-Purchase Act 1967, which says:

> 42(1) Upon complaint made to a court of a Magistrate by an owner who is entitled to take possession of any goods comprised in a hire-purchase agreement or by any person acting on behalf of an owner that the hirer or any person in possession of the goods has refused or fail to deliver

> up possession of the goods on a service of a notice of demand made by the owner or by an agent of the owner authorised in that behalf, the Magistrate may summon the person complained of to appear before the court and if appears to the court that the goods are being detained without just cause, the court may order the goods to be delivered up to the owner at or before a time, and at a place, to be specified in the order.

However the learned magistrate did not go further to say that he had held that where an owner fails to repossess the hired goods, then he has first to resort to s. 42 before he can commence an action against the hirer to recover a hire-purchase debt. It is thus unclear what significance, if any, s. 42 has on the issue decided.

A closer look at s. 42 will show that the court will only order the goods to be delivered up to the owner if it appears to the court that the goods are being detained without just cause. This means that it must first be proven to the court that the hirer or "any person" is in possession of the goods. If the goods are not or no longer in the possession of the hirer or "any person" then s. 42 will not bite. Therefore, if the hirer had sold the goods to a third party *albeit* illegally and in contravention of s. 38 of the Act, he will still not be subject to an order under s. 42 as he is no longer in possession of the goods. And if the third party had since sold the goods to an unknown fourth party, the problem can be further compounded many times over. Therefore, it cannot be the law that a prior recourse to s. 42 is mandatory before an owner (who has failed to repossess the goods) can sue to recover a hire-purchase debt.

Section 42 is designed for a situation where the owner has found the hirer in possession of the goods but due to some physical obstruction, is unable to repossess the goods. In such situation, the court, when moved under s. 42, may order the hirer to deliver up the goods under the threat of sanctions. This, however, has nothing to do with the owner's right to sue for the hire-purchase debt. Every finance company would like to repossess the hired goods from a defaulting hirer if they can. After all, the goods represent money and are much better than any paper judgment that it may get from the court in a civil suit. It is thus inconceivable that an owner would not repossess the goods if they can find them save in situations where the goods cannot be reached without committing a trespass (example where the goods are being locked up behind the hirer's gate) or where the "repossessor" is faced with a highly menacing hirer with a parang in his hand or some similar situations.

Conclusion

On the law and on the authorities cited above, I am of the opinion that repossession of the hired vehicle is not *a sine quo non* for the plaintiff (owner) to file his suit against the defendant in the lower court to recover moneys due under the hire-purchase agreement. The plaintiff had also clearly pleaded that the plaintiff had attempted to repossess the hired vehicle but the vehicle could not be found as it has not been in the address agreed to in the hire-purchase agreement and as such repossession was genuinely not possible. Section 42 of the Act is not applicable to the plaintiff as the plaintiff had no information that the said hired vehicle was still "in the possession of the hirer" or any other identified person.

In those premises, I allow this appeal and make the following order:

i) that the decision of the learned magistrate dated 29 August 2000 be set-aside; and

ii) that a judgment-in-default of appearance with the usual lower court costs and interest be entered against the defendant/respondent (since the appellant is not seeking costs of this appeal against the respondent, I am not making any such order).